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# IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

NO 990

THOMAS L. THAGGARD,

**Petitioner,**

VS.

UNITED STATES OF AMERICA,

**Respondent.**

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner Thomas L. Thaggard, pursuant to Rules 19 and 21, Revised Rules of the Supreme Court of the United States, Tit. 28, **Rules,** U.S.C.A., respectfully petitions this Honorable Court to issue its writ of certiorari to the United States Court of Appeals for the Fifth Circuit in order to review the judgment of said court rendered pursuant to opinion in the case of **Thomas Lester Thaggard vs. United States of America,** (Cir. 5, 1965), ____ Fed.2d ____, per Tuttle, C. J., Gewin and Coleman, JJ. (No. 22120, decided December 6, 1965, Petition for Rehearing denied, Motion to Extend Opinion denied, Motion to Certify Questions denied, January 6, 1966), a copy of which is appended hereto pursuant to Rule 23(i), Rules, supra.[1]

[1] For reported decisions of the Courts of the State of Alabama based on a state criminal prosecution arising out of the same facts and on a subsequent civil action in equity, see **Ex parte T. L. Thaggard,** (1963), 42 Ala. App. 229, 159 So.2d 813, certiorari denied 276 Ala. 117, 159 So.2d 820 and **T. L. (Cotton) Thaggard, et al vs. Union Bank & Trust Company,** (1965), 277 Ala. 485, 172 So.2d 49.

## JURISDICTION AND GROUNDS

The jurisdiction of this Honorable Court is invoked to review said judgment of December 6, 1965, pursuant to §1254(1) Tit. 28, United States Code, (Rule 23(b), **Rules,** supra) on the following grounds, demonstrating, pursuant to Rule 19, **Rules,** supra, the special and important reasons therefor, to-wit:

(1) The decision of the Court of Appeals for the Fifth Circuit is in conflict with the decision of the Court of Appeals for the Fourth Circuit in the case of **United States v. Rogers,** (Cir. 4, 1961), 289 Fed.2d 433, as concerns the construction of the Federal Bank Robbery Act (§2113, Tit. 18, United States Code). Certiorari will be granted where two Courts of Appeal have reached contrary results in the construction of a federal statute. **U. S. v. Muniz,** N. Y. 1963, 83 S.Ct. 1850, 374 U.S. 150, 10 L.Ed.2d 805. Rule 19.1. (b), **Rules,** supra.

(2) The Court of Appeals for the Fifth Circuit has misconceived the meaning of **United States v. Turley,** Md. 1957, 77 S.Ct. 397, 352 U.S. 407, 1 L.Ed2d 430, which it found to be controlling with regard to Petitioner's case. This affords a valid ground for certiorari. **Wilkinson v. U. S.,** Ga. 1961, 81 S.Ct. 567, 365 U.S. 399, 5 L.Ed.2d 633, rehearing denied 81 S.Ct. 1024, 365 U.S. 890, 6 L.Ed.2d 200. Rule 19.1.(b), **Rules,** supra.

(3) The Court of Appeals for the Fifth Circuit has decided a federal question in a way in conflict with applicable decisions of this Honorable Court. Rule 19.1.(b) **Rules,** supra.

(4) The Court of Appeals for the Fifth Circuit has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Honor-

able Court's power of supervision. Rule 19.1.(b), **Rules,** supra.

(5) The Court of Appeals for the Fifth Circuit has so far sanctioned such a departure by a lower court as is noted in ground (4) hereof, as to call for an exercise of this Honorable Court's power of supervision.

## QUESTIONS PRESENTED FOR REVIEW

It is respectfully alleged, pursuant to Rule 19.1.(c), that the following are the questions presented for review, to-wit:

(1) Whether the Federal Bank Robbery Act (§2313(b), Tit. 18, United States Code) in using the common law term "takes and carries away, with intent to steal, etc." declares common law larceny?

(2) Whether the case of **United States v. Turley,** 1957, Md., 77 S.Ct. 397, 352 U.S. 407, 1 L.Ed.2d 430, stands for the proposition that a criminal statute couched in terms of the felonious "taking and carrying away . . ." of the personal property of another declares other than common law larceny?

(3) Whether an appellate court can affirm a judgment of conviction erroneously secured in a felony case on one theory, on the speculation that conviction would have followed if the correct theory had been applied?

(4) Whether it is error in a felony case to give an expanded version of the "Allen" charge (**Allen v. United States,** Ark. 1896, 17 S.Ct. 154, 164 U.S. 492, 41 L.Ed.528)[2]

[2] Also known as, and sometimes called, the "dynamite charge", "shotgun instruction", and "nitroglycerin charge". Appropriately and officially indexed by West Publishing Company, St. Paul Minn. and Edward Thompson Company Brooklyn, N.Y. in the **United States Code Annotated,** Tit. 18, Rule 30, Note 12a under "—Third degree instructions."

to include a charge that "all trials are expensive. Your failure to agree upon a verdict will necessitate another trial equally expensive" and "you should consider that the case must at some time be decided," and this, in the absence of a request to do so, and on a second trial where there had been a previous hung jury and subsequent mistrial.

(5) Whether upon giving a supplemental charge to a jury upon its failure to agree in a felony case, a trial court is required on timely motion to charge additionally on burden of proof and presumption of innocence?

## CONSTITUTIONAL PROVISIONS AND STATUTES

The constitutional provisions and statutes which this case involves are as follows, viz:

(1) §2313(b), Tit. 18, United States Code:

> "(b) Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $100.00 belonging to, or in the care, custody, control, management, or possession of any bank, or any savings and loan association, shall be fined not more than $5,000.00 or imprisoned not more than 10 years, or both . . ."

(2) Art. III, Sec. II, C1.3, Constitution of the United States:

> "The trial of all crimes, except in cases of impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the trial shall be at such Place or Places as the Congress may by Law have directed."

(3) Amendment 6, Constitution of the United States: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense."

(4) Amendment 5, Constitution of the United States: ". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life and limb; . . ."

## STATEMENT OF THE CASE

On February 19, 1963, the Union Bank & Trust Company, Montgomery, Alabama, a bank insured by the Federal Deposit Insurance Corporation. (Tr.p.50), received two deposits aggregating approximately Forty-Three Thousand Dollars in United States currency for the account of the Alabama Power Company. (Tr.p.41). Due to a mistake on the part of a bookkeeper of the bank, (Tr.p.47), who bypassed the controls of a posting machine, (Tr.p.44), this sum was credited to the account of Alabama Motors Company on the day of deposit. (Tr.p.43).

Petitioner Thomas L. Thaggard, maintained an account in the Union Bank & Trust Company under the name of Alabama Motors Company. On the morning of March 6, 1963, Petitioner went to the statement teller of the Bank and requested his balance. (Tr.pp.113,114). By interphone in the usual and customary way, the statement teller ob-

tained from the bookkeeping department the balance in the Alabama Motors Company account, then wrote same down, (Tr.p.114), in the amount of Forty-Three Thousand Dollars, which balance she then verified with the bookkeeping department at his request. (Tr.p.115).

Petitioner then proceeded to the window of a paying teller of the bank and again asked for his balance in his account of Alabama Motors Company. (Tr.p.27). This teller called to the bookkeeper, gave him the account number, and requested the balance. (Tr.p.28). Upon receiving the balance as being in excess of Forty-Three Thousand Dollars, she wrote it down on paper and pushed this across to Petitioner. (Tr.p.32). He thereupon handed her a bank check in the amount of Forty-Three Thousand Dollars, (Tr.p.33), and said he wanted to withdraw that amount. (Tr.p.28). At the paying teller's request Petitioner endorsed this check, whereupon the teller again called the bookkeeping department to determine whether there were any uncollected fund claims against the account, thereafter paying the amount of the check to the Petitioner. (Tr. pp.29,30). The paying teller assumed that the check was good, according to what the bookkeepers had said, and paid him what she intended to pay, not misreading the check. (Tr.p.34). Petitioner made no representations of any kind other than endorsing and presenting the check. (Tr.p.32).

Subsequently, Petitioner was prosecuted in the courts of The State of Alabama for the crime of flase pretense. **Ex parte T. L. Thaggard,** (1963), 42 Ala. App. 229, 159 So.2d 813, certiorari denied, 276 Ala. 117, 159 So.2d 820, and was at the same time adjudged in contempt of a State Circuit Court for failure to disclose on a deposition on oral examination, and pending the prosecution for false pretense, the location of the Forty-Three Thousand Dollars

in question. **Ex Parte T. L. Thaggard,** ((In the Supreme Court of the State of Alabama, October Term 1962-63, 3rd Division 60.) Re: (**T. L. Thaggard vs. Honorable Eugene W. Carter** as Judge of the Circuit Court of Montgomery, County, Alabama) Re: (Union Bank & Trust Company a corporation v. T. L. (Cotton) Thaggard).) (Tr.p.4). Also material are two civil suits. One is at law, ((**Union Bank & Trust Co., a corporation vs. T. L. (Cotton) Thaggard,** (In the Circuit Court of Montgomery County, Alabama, At Law, Case No. 3866.)), and one in equity in which judgment was had against Thaggard for $43,000.00 and in which all his constitutional and common law exemptions were disallowed prior to the sale by the Sheriff of Montgomery County of all his property, including an undivided one-half interest in his homestead. **T. L. (Cotton) Thaggard et al vs. Union Bank & Trust Company,** (1965), 277 Ala. 485, 172 So.2d 49. The case also contains a motion to recuse directed to the State Committing Magistrate who initially considered the false pretense case, and his subsequent recusal on the ground of pecuniary interest. **City of Montgomery vs. T. L. Thaggard, alias Cotton Thaggard.** (In the Recorders Court of the City of Montgomery, Alabama, Case No. 73788); an alternative writ of mandamus issued out of the Court of Appeals of the State of Alabama, directed to the Sheriff of Montgomery County commanding him to take and approve a valid $25,000.00 appearance bond set by that Court and tendered by the Appellant. **Ex parte T. L. Thaggard,** (In the Court of Appeals of the State of Alabama, October Term, 1962-63, 3rd Division 146.) Re: (**T. L. Thaggard vs. Honorable Mac Sim Butler, as Sheriff of Montgomery County, Alabama**); and a mistrial in the United States District Court for the Middle District of Alabama after a petit jury deliberated some seven and one-half hours. **United States v. T. L. Thaggard,**

(In the United States District Court for the Middle District of Alabama, Northern Division, March Term, 1964, No. 11624-N). Thereafter, Petitioner was indicted for the offense of grand larceny in violation of §2113(b), Tit. 18, United States Code, (Tr.pp.2,3), pleas of former jeopardy (antrefois acquit) and res judicata via collateral estoppel were summarily denied, Petitioner pleaded not guilty, and after a second trial by jury in the United States District Court for the Middle District of Alabama, was convicted, (Tr.p.175), and committed to the custody of the Attorney General of the United States for a period of five years, (Tr.pp. 179, 180), from which judgment and commitment he prosecuted an appeal to the United States Court of Appeals for the Fifth Circuit. The Court of Appeals affirmed the judgment of conviction and denied a petition for rehearing, a motion to extend opinion and a motion to certify questions to the Supreme Court.

## ARGUMENT AMPLIFYING REASONS

The Petitioner contends that §2113(b) Tit. 18, United States Code, declares the offense of common law larceny. Indeed, the United States Court of Appeals of the Fourth Circuit has so held in the case of **United States v. Rogers**, (Cir.4. 1961), 289 Fed.2d 433. The analogy of §2113(b) supra, (Federal Bank Robbery Act), to §2312, Tit. 18, United States Code, (National Motor Vehicle Theft Act), is clearly laid in error. In §2312, (National Motor Vehicle Theft Act), the word was "stolen". The Supreme Court said "(w)e recognize that where a Federal criminal statute uses a common law term of established meaning without otherwise defining it, general practice is to give that term its common law meaning (citing footnote) but 'stolen' (or 'stealing') has no common law meaning." **United States v. Turley**, Md. 1957, 352 U.S. 407, 1 L.Ed.2d, 430, 77 S. Ct. 397.

In its opinion below, the Court of Appeals stated that the statute here in question, i.e. §2113(b), (Federal Bank Robbery Act), makes no mention of "larceny"; but is couched in terms of "steal and purloin". This statement is erroneous. The statute is couched in terms of "takes and carries away, with intent etc." Only the **intent** element is couched in terms of "steal and purloin". The prima facie act is couched in terms of "taking and carrying away." The "act" of "taking and carrying away" is not malum in se. **Morissette vs. United States,** 342 U.S. 246, 72 S.Ct.240, 96 L.Ed. 288. These are the classical, traditional, descriptive words of common law larceny. **United States v. Rogers,** supra, IV Blackstone, **Commentaries,** 229, 232; Black's Law Dictionary, Fourth Edition, St. Paul, Minnesota, 1951, **Common Law Larceny,** page 1023. Any dictionary will so define "larceny", e.g. Webster's Seventh New Collegiate Dictionary, G & C. Merriam Company, Springfield, Massachusetts, 1963, defines "larceny" as the unlawful "taking and carrying away" etc., the precise, exact, same, identical, very words used in §2113(b), Tit. 18, U. S. C. The **Turley** case, supra, on which the Court of Appeals relied, so holds. On page five of its opinion, the Court of Appeals quotes from the opinion in **Turley** wherein this honorable court acknowledges that the definition of larceny is— "the felonious taking and carrying away of the personal goods of another". It is restating the obvious to say that these are the very words of the statute which we are here considering, and which the Court of Appeals says do not declare common law larceny. Petitioner respectfully avers further that the opinion of the Court below has done with a stroke of the pen what the Congress of the United States has never done, i.e. made §2313(a) (Robbery) and §656 (Embezzlement) Tit. 18, U.S.C., pure surplusage and passe, for they are certainly no longer needed with the new scope

afforded §2113(b), i.e. "taking and carrying away", as wide as the color spectrum. Hence, the opinion below is squarley contra to **United States v. Rogers,** supra. The statute must be strictly construed. Due process of law requires as much. Please see the excellent collection of federal and common law authorities in **Shuttlesworth v. City of Birmingham,** (1965), ____Ala. App.____, 180 So.2d 114, 131 et seq.[3] The above argument amplifies reasons numbers one, and two, supra. Rule 23(h), **Rules,** supra.

The opinion below acknowledges that the trial Judge charged on "common law larceny". (Tr.p. 189). The Court of Appeals then holds that the charge was erroneous; but the error was harmless and that the defendant (Petitioner) was "benefited." (Tr.p. 191). It then affirms the judgment of conviction. In **Bollenbach v. United States,** 1946, 326 U.S. 607, 66 S.Ct. 402, 90 L.Ed. 350, Mr. Justice Frankfurter with force and conviction stated:

> "(W)e cannot treat the manifest misdirection in the circumstances of this case as one of those 'technical errors' which 'do not affect the substantial rights of the parties' and must therefore be disregarded. 40 Stat. 1181, 28 U.S.C. §391, 28 U.S.C.A. §391. All law is technical if viewed solely from concern for punishing crime without heading the mode by which it is accomplished. * * * Diviations from formal correctness do not touch the substance of the standards

[3] If this Honorable Court grants its writ of certiorari in this case, then Petitioner will demonstrate that the facts proved below do not consitute common law larceny by mistake because of the absence of a trespass to title in the taking. Petitioner does not here make any argument in this regard because as he reads Rules 19 and 21, **Rules,** supra, such would not be proper at this point. See however, **United States v. Patton,** (3rd Cir. 1941), 120 Fed.2d 73; **Murphy v. United States,** (5th Cir. 1953), 206 Fed.2d 571; Perkins, **Criminal Law,** (Brooklyn, The Foundation Press 1957), at page 213.

by which guilt is determined in our courts, and it is these that Congress rendered harmless. * * * From presuming too often all errors to be 'prejudicial' the judicial pendulum need not swing to presuming all errors to be 'harmless' if only the appellate court is left without doubt that one who claims its corrective process is, after all guilty. In view of the place of importance that trial by jury has in our Bill of Rights, it is not to be supposed that Congress intended to substitute the belief of appellate judges in the guilt of an accused, however justifiably engendered by the dead record, for ascertainment of guilt by jury under appropriate judicial guidance, however cumbersome that process may be."

Also, we quote from **Wilson v. United States,** (C.C.A.9), 1958, 250 Fed.2d 312, 324, 325:

"It is a fundamental precept of the administration of justice in the federal courts that the accused must not only be guilty of the offense of which he is charged but convicted according to proper legal procedures and standards. In short, it is not enough that the accused be guilty; our system demands that he be found guilty in the right way. Accordingly, it is no answer to the application of an erroneous standard of law that the evidence is sufficient to support a verdict reached in accordance with the proper standard of law. As the Supreme Court stated in a jury case in respense to such a contention.

'It may not be amiss to remind that the question is not whether guilt be spelt out of a record, but whether guilt has been found by a jury according to the procedures and standards appropriate for criminal trials in the

federal courts.' **Bollenbach v. United States,** 326 U.S. 607, 614-615, 66 S.Ct. 402, 90 L.Ed.350.

The decisions are plentiful that an appellate court cannot affirm a conviction erroneously secured on one theory, on the speculation that conviction would have followed if the correct theory had been applied. **Pearson v. United States,** 6 Cir. 192 F.2d 681; **People v. Bigley,** 178 Misc. 552, 35 N.Y.S.2d.130; **People v. Roper,** 259 N.Y. 170, 181 N.E. 88; **People v. Hewlett,** 108 Cal. App.2d 258, 239 P.2d 150, 159; 24 C.J.S. Criminal Law §1834, p. 676.

It does not matter whether or not guilt is a close question. The accused is entitled in any case to be tried under proper legal criteria."

Please see the argument in the petition for rehearing before the Court of Appeals. (Tr.pp.202-211). The writer of this brief, with all the emphasis which can be conveyed by the printed word, sincerely denies that Petitioner was benefitted by the erroneous charge. If anything, he was denied the basic right to effective counsel. Art. VI, Constitution of the United States. (Tr.p. 209). Further, the opinion below has made every non-collusive, intentional or even negligent over-draft a prima facie violation of The Federal Bank Robbery Act and a bank employee who now willingly permits an overdraft becomes prima facie an aider and abettor, also a federal crime.

Additionally, and concerning ground five, supra, the trial court, on the first and second trials of this case, gave the so called "Allen" or "dynamite" charge to the jury, on its own motion. Previously, there had been a mistrial because of a hung jury, where the same charge was also given. In the charge, the Court admonished

the jury that "all trials are expensive" and that they" * * * must consider that the case must sometime be decided." Petitioner contends that both of these statements constitute error to reverse. The "all trials are expensive" aspect of the charge was recently disapproved. **United States v. Smith**, (1962), 303 Fed. 2d 341. The charge that the case "must at sometime be decided" was held erroneous in **U. S. v. Gordan**, (1952), 196 Fed. 2d 886, reversed on other grounds 73 S.Ct. 369, 344 U. S. 414, 97 L.Ed.447. This Honorable Court recently disapproved of such a charge in **Jenkins v. U.S.**, (D.C. 1965), 85 S.Ct. 1059, 380 U.S. 445, 12 L.Ed.2d 957. The special concurring opinion in the decision of this case in the Court of Appeals condemned the giving of this charge, and three Judges of that Court have now expressed disapproval of the charge, i.e. Brown, J. in **Huffman v. United States**, (C.C.A. 5), 297 Fed. 2d 754, (1962), Widsom, J. in **Andrews v. United States**, (C.C.A. 5), 309 Fed. 2d 127, (1962); and in **Green v. United States**, (C.C.A. 5), 309 Fed 2d. 852, (1962); and Coleman, J. in the instant case.

Finally, and this argument admittedly amplifies no ground, supra, Petitioner respectfully requests this Honorable Court to reexamine its prior holdings as same concern former jeopardy in relation to a previous State prosecution. Please see the dissenting opinions of the Chief Justice and Black and Douglas, JJ. in **Bartkus v. Illinois**, 1959, 359 U.S. 121, 79 S.Ct. 676, 3 L.Ed.2d 684, rehearing denied 360 U.S. 907, 79 S.Ct. 1283, 3 L.Ed. 2d 1258; **Abbate v. U.S.**, 1959, 359 U.S. 187, 79 S. Ct. 666, 3 L.Ed.2d 258, dissenting opinions of Brennan, Black and Douglas, JJ., Warren, C. J. concurring.

## CONCLUSION

Petitioner was vigorously prosecuted by the State of Alabama for the common law crime of false pretense.[4] Thereafter, he was vigorously prosecuted twice by the United States on a theory of larceny. Both times the jury hung. In the first trial the jury stayed hung after the "Allen" charge plus. In the second trial the "— Third degree instructions" were effective. The jury convicted. The Court of Appeals held that Petitioner was tried on the wrong theory of law, rewrote the statute in question and then decided that Petitioner was guilty under their new construction of the statute. Chief Judge Tuttle and Judges Gewin and Coleman are "able, dedicated, experienced Judges"[5] for whom the writer of this petition has the highest respect; but they do not satisfy the constitutional requirement of impartial jurors in a criminal case.

Petitioner respectfully asks the Court to issue its writ in this case.

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## AFFIDAVIT OF SERVICE

Before me, Omega N. Huckeby, a Notary Public in and for the State of Alabama at Large, personally appeared Ira De Ment, who being known to me and being by me first placed under oath, did depose and say that he has served copies of the foregoing petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit, upon the United States of America by depositing a copy of same, first-class postage prepaid, in the U. S. Mail properly addressed to the Solicitor General, Department of Justice, Washington 25, D. C., and to Honorable Ben Hardeman, United States Attorney for the Middle District of Alabama, Montgomery, Alabama, attorney of record for the Respondent in the Court of Appeals for the Fifth Circuit in complainance with Rules 33 2(a) and 33 3(c), Supreme Court Rules, Tit. 28, U.S.C.A.

Ira De Ment

Ira De Ment

Sworn to and subscribed before me this the 3rd day of February, 1966 at Montgomery, Alabama.

Omega N. Huckeby

Notary Public for State of Alabama at Large

[4] The opinions of the State Appellate Courts are cited supra.

[5] Tr.p. 198.

[6] Petitioner's attorney is not yet admitted to the bar of this Honorable Court. His admission has been approved; but he will be unable to appear for admission until February 21, 1966 as this is when the Court reconvenes. The petition must be filed, however, on or before February 5, 1966. Hence the petition is filed by petitioner, pro se, with his attorney appearing of counsel, until admission.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 22120

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THOMAS LESTER THAGGARD,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

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Appeal from the United States District Court for the Middle District of Alabama.

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(December 6, 1965.)

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Before TUTTLE, Chief Judge, GEWIN and COLEMAN, Circuit Judges.

TUTTLE, Chief Judge: This is an appeal from a conviction and sentence for violation of the Federal bank robbery statute, 18 U.S.C.A. § 2113 (b).[1]

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[1] This statute provides: "(b) Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $100.00 belonging to, or in the care, custody, control, management, or possession of any bank, or any savings and loan association, shall be fined not more than $5,000.00 or imprisoned not more than 10 years, or both . . ."

The facts which could be found by the jury in support of their verdict are substantially as follows:

On the morning of March 6, 1963, appellant received his February, 1963 bank statement from the Union Bank & Trust Company, showing a balance in excess of $43,000. He showed this statement to a friend, remarking, "You don't make this kind of money in used car business." It appears that the bank had received two deposits aggregating approximately $43,000 for the account of the Alabama Power Company and that, as the result of a bookkeeping mistake, this sum was erroneously credited to the account of Alabama Motors Company (owned by Thaggard). On the same morning, March 6th, Thaggard went to the statement teller of the bank and requested the amount of his balance in the Alabama Motors account. The teller obtained this balance from the bookkeeping department, wrote it down for Thaggard in the amount of $43,498.38, and handed him the piece of paper containing this information, after again verifying the amount at his request. Shortly thereafter Thaggard asked a paying teller at the bank for the amount of the balance in the Alabama Motors account. This teller also called the bookkeeper, obtained the same balance, and handed appellant a piece of paper containing this information. Appellant then handed this same paying teller a check in the amount of $43,000 and said he wished to withdraw that amount. At the paying teller's request, appellant endorsed this check, whereupon the teller again called the bookkeeping department to determine whether there were any uncollected items against the account, thereafter paying the amount of the check to appellant. The paying teller assumed at the time of payment that the check was good and did not in any way misread the check, i.e., she intended to pay Thaggard the $43,000.

Around ten minutes after the payment to appellant, the true facts were discovered and appellant was finally located and taken to police headquarters on the night of March 6th, although he was not then under arrest. At this time appellant admitted that he had not made the $43,000 deposit, that he knew of no one who would have had any occasion to make such a deposit to his account and that the money did not belong to him. Subsequently, appellant was indicted under the Federal bank robbery statute and, after trial by jury in the district court, was found guilty. From this judgment Thaggard has taken this appeal.

The appeal here is based upon three principal contentions. The first is that in order to be guilty of violation of the Federal bank robbery statute, a case of common law larceny must be proved, whereas the principles underlying common law larceny were not presented to the jury in the charge of the trial court. The second is that if the Federal bank robbery statute is construed to comprehend something broader than common law larceny, then the conviction must be reversed because the trial court did not give the statute such broad construction, and the issue was, therefore, not properly presented to the jury. The third contention is that the trial court erred in giving the so-called "Allen" charge, see **Allen v. United States,** 164 U.S. 492, as putting improper pressure on the jury to bring in a verdict.

At the outset it will be noted that the Federal statute makes no mention of "larceny;" it is couched in terms of "steal and purloin," and this is what was charged in the indictment. Nevertheless, appellant confidently bases his contention on the dictum in **United States v. Rogers,** (4 Cir.) 1961, 289 F.2d 433, where the Court said, at page 437, "We accept the defendant's premise that paragraph (b) of the Bank Robbery Act reaches only the offense of

larceny as that crime has been defined by the common law." With great deference to the views of the Court of Appeals for the Fourth Circuit, we cannot agree with this conclusion. We believe that as to this matter the Supreme Court's decision in **United States v. Turley**, 352 U.S. 407, leads to a contrary result. In **Turley** the Supreme Court had before it the interpretation of the National Motor Vehicle Act, commonly known as the Dyer Act, which provides, "Whoever transports in interstate or foreign commerce a motor vehicle or aircraft, knowing the same to have been stolen, shall be fined not more than $5,000.00 or imprisoned not more than five years, or both." The indictment there before the court charged that Turley lawfully obtained possession of an automobile from its owner for the purpose of driving certain of his friends to the homes of the latter in South Carolina, but that, without permission of the owner, and with intent to steal the automobile, Turley converted it to his own use and unlawfully transported it in interstate commerce to Baltimore, Maryland, where he sold it without permission of the owner. As the Supreme Court said, "The information thus charged Turley with transporting the automobile in interstate commerce knowing it to have been obtained by embezzlement rather than by common law larceny."

Dealing with the question of the meaning of this statute, the Court said,

> "We recognize that where a federal criminal statute uses a common law term of established meaning without otherwise defining it, the general practice is to give that term its common law meaning (citing as a footnote United States v. Carll, 105 U.S. 611, United States v. Smith, 5 Wheat. 153, 1820, United States v. Brandenberg, 144 F.2d 656 (C.A. 3) 1944) but 'stolen' (or 'stealing') has no accepted

common law meaning. On this point the Court of Appeals for the Fourth Circuit recently said:

> 'But while "stolen" is constantly identified with larceny, the term was never at common law equated or exclusively dedicated to larceny. "Steal" (originally "stale") at first denoted in general usage a taking through secrecy, as implied in "stealth," or through stratagem, according to the Oxford English Dictionary. Expanded through the years, it became the generic designation for dishonest acquisition, but it never lost its initial connotation. Nor in law is "steal" or "stolen" a word of art. Blackstone does not mention "steal" in defining larceny—"the felonious taking and carrying away of the personal goods of another"—or in expounding its several elements. IV Commentaries 229 et seq." Boone v. United States, 235 F.2d 939, 940 (C.A. 4th Cir. 1956).'"

The Supreme Court ended its opinion by saying,

> "'Stolen,' as used in 18 U.S.C. § 2312 includes all felonious takings of motor vehicles with intent to deprive the owner of the rights and benefits of ownership, regardless of whether or not the theft constitutes common-law larceny."

In this decision the Supreme Court expressly disapproved of this Court's prior decision in **Murphy v. United States**, 5 Cir., 206 F.2d 571 (an automobile obtained by false pretenses).

But, says the appellant, this case was tried to the jury on the theory of common law larceny. It is pointed out that the trial court used the word "larceny" several times in his charge to the jury. It is plain that the trial court did intend to apply the rule set down in **United States v.**

**Rogers, supra.** The court charged "An essential element of the crime of larceny is the felonious taking; that is, the wilful, conscious, intentional, voluntary taking, the taking with an evil motive and with a bad purpose and with a criminal intent; taking away the personal property of another. In addition, the law says in a prosecution under this statute the taking must be by a trespassing; that means it must be an invasion of the owner's right of possession in the property concerned, money in this case. However, the law says that when the owner that transfers the property acts under a unilateral mistake, that is, a mistake only on his part, that is a mistake of fact, and intends only to relinquish title to the lawful owner, the delivery of the money to the person inducing the mistake, if you find that to be the case in this particular instance, may be ineffective to transfer ownership of the property. Now if the receiver of the property feloniously—as I have defined that term to you—induces the mistake that results in the delivery of the property to him, and receives the money with a felonious intention of appropriating it to his own use, and does so appropriate it, then the receipt and removal of the money may be larceny within the meaning of the statute under which this indictment is laid, and under which this defendant, T. L. Thaggard, is being prosecuted."

The court then said further, in construing the word "trespass," "In this type of larceny prosecution, by the term, 'by trespass' as I have used it and as the law defines it, means the taking of the property, money here, without the owner's consent. The intention of the owner not to part with title to the money when relinquishing possession of it to the defendant or the receiver, Thaggard in this case, is the essence of the offense of larceny, insofar as this prosecution is concerned. Now the correct distinction in cases of this kind seems to be, under the law, that if by

means of any trick or fraud the owner of the property, the bank, the Union Bank and Trust Company, is induced to part with the possession only, still meaning to retain the ownership, the taking and removal by such means, where the required felonious intent is present and where the other elements are present, is, under the law, larceny. On the other hand, if the owner intentionally, that is, the Union Bank and Trust Company, parts not only with the possession of the goods, the money, but with the ownership in the goods, also, the offense of the party obtaining the money will not be larceny under the law in this case, but, if anything, the crime of obtaining money by means of false pretenses and subject to prosecution in the state court."

It is clear from this charge that the appellant was benefited by the narrow construction placed upon the statute by the trial court. In other words, the trial court expressly charged that if the bank and its agents intended to give possession and ownership of the money to Thaggard, having been induced to do so by false pretenses or by mistake induced by Thaggard, the elements of the crime were not proved. The trial court, under the construction of the statute which we place on it, required the proof of more than the government is required to prove in a bank robbery case. Nothing said in the trial court's charge increased the burden on appellant, but, rather, as we have indicated, it was considerably more beneficial to him than would have been a correct charge. This, then, disposes of the first two criticisms made by appellant.

As to appellant's subsidiary contention that there was no proof to warrant the court's reference to "trick" or "fraud" or "inducement" by appellant, we think the statement of facts at the beginning of this opinion clearly refute this contention. There can be little doubt but that the jury could have found that Thaggard intended by

preparing a check payable to cash in the amount of some $43,000 in excess of the amount he knew he was entitled to withdraw from the bank, "induced" the bank to part with possession, if not title, to money that did not belong to him, we think it is not too strong a word for the court to speak of this in terms of a "trick" or a "fraud," leaving up to the jury, of course, the question whether Thaggard did these things with criminal intent.

Next, we consider the criticism by appellant of the use by the trial court of a charge after more than a day's deliberation, patterned after the "Allen" charge.[2]

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[2] "THE COURT:

Keep your seats, please. I realize you haven't, since yesterday afternoon, asked me for any additional instructions. However, I know that you jurors are attempting to discharge your responsibilities in a conscientious manner. I stand ready at any time, if you request it, to charge you additionally on the law. I have made the charge on the law of this case as simply as the applicable law will permit me to do it. I charge you additionally at this time that this is an important case. That all trials are expensive. Your failure to agree upon a verdict will necessitate another trial equally as expensive. This court is of the opinion that the case cannot be again tried better or more exhaustively than it has been on either side. It is therefore very desirable that you should reach a verdict. This court does not desire that any juror should surrender his conscientious convictions; on the other hand, each juror should perform his duty conscientiously and honestly according to the law in this case and according to the evidence in the case, and although the verdict to which a juror agrees must, of course, be his own verdict, the result of his own convictions and not a mere acquiescence in the conclusion of his fellows, yet in order to bring twelve minds to a unanimous result you jurors must examine the questions submitted to you with candor and with a proper regard and deference to the opinions of the other (116) members on the jury. You should consider that the case must at some time be decided; that you were selected in the same manner and from the same source from which any future jury must be, and there is no reason to suppose that the case will ever be submitted to more intelligent, more impartial, or more competent to decide it, or that clearer evidence will be produced on one side or the other. In con-

This court, although sometimes reluctantly, has approved the "Allen" charge, while carefully assuring ourselves that there are not engrafted upon it any partial or one-sided comments. We note that the charge given here by the trial court contained none of the objectionable language that appeared in **Powell v. United States,** 5 Cir., 1961, 297 F.2d 318, or in **Huffman v. United States,** 5 Cir., 1962, 297 F.2d 754, or in **Green v. United States,** 5 Cir., 1962, 309 F.2d 852. Nor was it one-sided, as was the case in the Fourth Circuit case of **United States v. Rogers,** 289 F.2d 433. Such a charge, so long as it makes plain to the jury that each member of the jury has a duty conscientiously to adhere to his own honest opinion and avoids creating the impression that there is anything improper, questionable, or contrary to good conscience for a juror to cause a mistrial, **cf.** dissenting opinion in **Huffman v. United States,** 297 F.2d 754, at 759, is still a permissible charge to be given in proper circumstances in this Circuit.

We think the language does not go beyond the bounds of the permissible scope of such a charge.

The judgment is AFFIRMED.

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ferring together, you ought to pay proper respect to each other's opinions, with a disposition to be convinced by each other's arguments; and, on the other hand, if much the larger number of your panel are for a conviction, a dissenting juror should consider whether a doubt in his own mind is a reasonable one, which makes no impression upon the minds of so many equally honest, equally intelligent with himself, who have heard the same evidence with the same attention and with an equal desire to arrive at the truth of the matter and under the sanction of the same oath. On the other hand, if a majority are for acquittal, the minority ought seriously to ask themselves whether they may not reasonably, and ought not to, doubt the correctness of a judgment which is not concurred in by most of those with whom they are associated on this jury, and distrust the weight or sufficiency of that evidence which fails to carry conviction to the minds of their fellow jurors. With that additional charge, you retire to the jury room."

COLEMAN, Circuit Judge, Specially Concurring:

A dissent on my part as to the giving of the Allen charge in this case would not affect the outcome. I, therefore, refrain from it at this early stage of my Federal Judicial career. I do wish by this specially concurring opinion, however, to record my views with reference to the use of the Allen or "dynamite" charge in Federal criminal prosecutions.

I realize that as long as **Allen v. United States**, 164 U.S. 492, 41 L. Ed. 528, 17 S. Ct. 154 (1896) stands it is our duty to follow it. I entertain the thought that if it were submitted to the Supreme Court today the result might not be the same as it was in 1896. I cannot see that the qualifications, reservations, and escape clauses customarily used in modern versions of the charge save it from being what it is, and what the jury believes it to be, a direct appeal from the Bench for a verdict.

Before proceeding further, however, I would like to set out the exact form of the charge which did receive approval in the **Allen** case, **supra**.

As taken from Page 501 of 164 U. S. Reports, the charge approved on appeal was as follows:

> "That although the verdict must be the verdict of each individual juror, and not a mere acquiescence in the conclusion of his fellows, yet they should examine the question submitted with candor and with a proper regard and deference to the opinions of each other; that it was their duty to decide the case if they could conscientiously do so; that they should listen, with a disposition to be convinced, to each other's arguments; that, if much the larger number were for conviction, a dissenting juror should consider whether his doubt was a reasonable one

> which made no impression upon the minds of so many men, equally honest, equally intelligent with himself. If, upon the other hand, the majority was for acquittal, the minority ought to ask themselves whether they might not reasonably doubt the correctness of a judgment which was not concurred in by the majority".

The cases show that this instruction has frequently been extended and embellished, far beyond the language just quoted.

In the instant prosecution, it is significant that there had already been one hung jury in a previous trial. At 12:37 P.M., on the second day of deliberation, the record quotes the District Judge as saying "this seems to be a rerun of the last case from beginning to end". When the jurors returned from lunch, and without their requesting further instructions, the Court gave what is now commonly referred to as the Allen charge, but it did not follow the 1896 precedent in several particulars. For example, the jury was told "all trials are expensive. Your failure to agree upon a verdict will necessitate another trial equally as expensive. * * * you should consider that the case must at some time be decided".

Certainly, all trials are expensive. The Government knows this when the prosecution is begun. To me, expense is never a consideration either to be mentioned or entertained in the dispensation of justice. In these days of ever increasing governmental costs, it requires no wild flight of the imagination to note what an ordinary juror thinks about the expenses of the government or how a reminder of expenses will likely affect his reasoning and reactions.

Moreover, I am not aware of any law which requires that a case "must at some time be decided". True, under justifiable circumstances a case must be tried, but it is intrinsic in the jury system that a jury may never be found to agree unanimously on the guilt or innocence of a person charged with crime. I have known of many cases that were tried to as many as three juries and agreement was never reached. It is my belief that no law requires any criminal prosecution to be decided, but simply requires that it be submitted to a fair and impartial trier of the fact.

Article III, Section II, Clause 3 of the United States Constitution requires that the trial of all crimes, except in cases of impeachment, shall be by a jury. The Sixth Amendment commands that in all criminal prosecutions the accused shall enjoy the right to a trial by an impartial jury. To my mind this means, and ought to mean, a jury free of every influence except the law and the evidence.

I agree with what Judge Brown said in **Huffman v. United States,** 5 Cir., 297 Fed. 2d 754 (1962). "The strength of the jury system is its absolute, real, actual independence. It must take its instruction on the law from the Judge, but the jury alone determines the facts." " * * * There is no longer any place for the Allen charge."

I likewise heartily agree with what Judge Wisdom said in **Andrews v. United States,** 5 Cir., 309 Fed. 2d 127 (1962), and in **Green v. United States,** 5 Cir., 309 Fed. 2d 852 (1962). See also **United States v. Rogers,** (Cir.), 389 Fed. 2d 433 (1961).

I recall the words of Mr. Chief Justice Fuller in **Starr v. United States,** 153 U. S. 614, 14 S. Ct. 919, 38 L. Ed. 841, "It is obvious that under any system of jury trials the influence of the trial judge on the jury is necessarily and properly of great weight, and that his lightest word or

intimation is received with deference, and may prove controlling".

I also recall the words of Mr. Justice Frankfurter, in a different situation but clearly analogous, "An experienced trial judge should have realized that such a long wrangle in the jury room as occurred in this case would leave the jury in a state of frayed nerves and fatigued attention, with the desire to go home and escape overnight detention, particularly in view of a plain hint from the Judge that a verdict ought to be forthcoming". **Bollenbach v. United States**, 326 U.S. 607, at 612; 66 S. Ct. 402; 90 L. Ed. 350.

There is no intention of criticizing the District Judge for using this instruction. It is being done all the time, and it seems to the writer from considerable trial experience that the practice is growing instead of diminishing. It likewise seems from practical experience that after a jury has retired to consider its verdict, has done so for some time, and has indicated that it is in hopeless deadlock, every juror, not being trained in the law, understands from the Allen charge that what the Judge wants is a verdict. So, there the previously reluctant juror stands, fancying himself in opposition to the wishes of a United States Judge, which is about the last position in which he ever wanted to find himself. He is only exercising everyday human nature when he gets out of that unhappy predicament just as quickly as he can.

The real burden of what I am saying is that the essential meaning of Constitutionally guaranteed trial by jury is that once the jury has retired to consider of its verdict it should not be subjected to so much as the appearance of any influence from any source for the purpose of producing a verdict. The jurors should be left to the un-

hampered expression of their own consciences, independently arrived at.

In expressing these views I do so with greatest deference to the opinion of the able, dedicated, experienced Judges who feel that there was no reversible error in the charge used here.

# In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 990

THOMAS L. THAGGARD, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINION BELOW

The opinion of the court of appeals (Pet. 19–32; Tr. 184) is not yet reported.

### JURISDICTION

The judgment of the court of appeals was entered on December 6, 1965 (Tr. 200). A petition for rehearing was denied on January 6, 1966 (Tr. 214). The petition for a writ of certiorari was filed on February 5, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### QUESTIONS PRESENTED

1. Whether petitioner was properly convicted of bank robbery in violation of 18 U.S.C. 2113(b).



210-105—66

2. Whether the trial court's supplemental instructions in the nature of an *Allen* charge were erroneous.

## STATUTE INVOLVED

18 U.S.C. 2113(b) provides in pertinent part:

> Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, or any savings and loan association, shall be fined not more than $5,000 or imprisoned not more than ten years, or both; * * *

## STATEMENT

After a jury trial in the United States District Court for the Middle District of Alabama, petitioner was convicted of violating 18 U.S.C. 2113(b). He was sentenced to imprisonment for 5 years (Tr. 180).

The evidence established that, on the morning of March 6, 1963, petitioner received his February bank statement which showed an erroneous balance in excess of $43,000.[1] Exhibiting the statement to an acquaintance, petitioner said "You don't make this kind of money in used car business" (Tr. 65–66). Petitioner went to the bank and asked the statement teller

[1] The bank had received two February deposits totalling approximately $43,000, for the account of the Alabama Power Company. As a result of a bookkeeping mistake, they were erroneously credited to the account of Alabama Motors Company owned by petitioner (Tr. 40–41, 68). Petitioner's actual balance was $649.17 (Tr. 44); his February deposits totaled only $1,504.19 (Tr. 46).

for the amount of his balance. After checking with the bookkeeper, the teller wrote the amount of $43,498.38 on a slip of paper and handed it to petitioner (Tr. 114–115). Shortly thereafter, petitioner made the same inquiry of the paying teller with the same result. Petitioner then said that he wished to withdraw $43,000, and presented to the paying teller his check for that amount (Tr. 27–28). Petitioner endorsed the check at the teller's request (Tr. 29). The teller called the bookkeeper to determine whether there were uncollected items against the account and then gave petitioner $43,000 in cash (Tr. 29–30).

Ten minutes after the transaction had occurred, the error was discovered. The bank officers sought unsuccessfully to locate petitioner (Tr. 67–70). That night, he was found and taken to police headquarters and to the bank, although he was not yet under arrest (Tr. 124, 71, 89). At the bank, he admitted that neither he nor anyone he knew made a $43,000 deposit to his account, and that the money did not belong to him (Tr. 92–93). He refused to say where the money was located. Although he promised to bring it to the bank the next day, he never returned the money (Tr. 93, 98–99).

The trial judge instructed the jury that an essential element of the crime charged (larceny) is a trespassory taking, that is, a taking without the owner's consent. The judge further charged that where the receiver of property has induced the transfer by knowingly taking advantage of the transferor's unilateral mistake that, too, could be a trespassory tak-

ing if the transferor retained title to the property[2] (Pet. App. 23–25). After the case had been submitted to the jury and its deliberations had proceeded into the second day (a total of approximately 5½ hours) the trial judge gave an instruction in the nature of an *"Allen charge," i.e.,* an instruction that it is "very desirable" for the jury to reach a verdict (Pet. App. 26, n. 2). Thereafter, in the hour following the *Allen* charge, the trial judge gave supplemental instructions on the law in the case in response to jurors' inquiries (Tr. 148–149, 149–151, 165–169). Approximately 40 minutes later, the jury reached its verdict.

The court of appeals affirmed petitioner's conviction. It noted that the trial judge had limited his instructions to common-law larceny (Pet. App. 23) as a result of his narrow construction of 18 U.S.C. 2113(b) (Pet. App. 21–23, 25); however, "Nothing said in the * * * charge increased the burden on appellant, but, rather, * * * it was considerably more beneficial to him than would have been a correct charge" (Pet. App. 25). In addition, the Court of appeals held that there was no error in the *Allen* charge (Pet. App. 26–27).

## ARGUMENT

1. Petitioner's present assertion that he was prejudiced because the court of appeals' interpretation of

[2] Under the common law, if technical legal title passed in the transaction, the receiver could not be charged with larceny on the theory that his possession was not trespassory since he had become the owner of the property. Cf. *United States* v. *Rogers*, 289 F. 2d 433, 438 (C.A. 4).

Section 2113(b) was not charged to the jury is without merit. He successfully urged the trial court to construe Section 2113(b) as limited to common-law larceny while the government suggested the less restricted view ultimately accepted by the court of appeals (see Tr. 170–171). The broader theory—that any deliberate theft falls within the statute—eliminates the necessity of proving the added technical element of trespass. Inasmuch as the trial judge instructed the jury on trespass, petitioner clearly benefited and cannot complain. While there is a theoretical divergence between *United States* v. *Rogers,* 289 F. 2d 433 (C.A. 4), and the decision of the court below, further review is not warranted for it would not affect the outcome of this case. Moreover, the difference in approach taken by the Fourth and Fifth Circuits may well be without practical effect in view of the *Rogers* holding that facts such as those present here fall within the common-law definition of larceny.[3]

The evidence fully supports petitioner's conviction on either theory. Petitioner admittedly knew that he did not have $43,000 in the bank. His knowledge

[3] See 289 F. 2d at 438:

> "It has long been recognized, however that when the transferor acts under a unilateral mistake of fact, his delivery of a chattel may be ineffective to transfer title or his right to possession. If the transferee, knowing of the transferor's mistake, receives the goods with the intention of appropriating them, his receipt and removal of them is a trespass and his offense is larceny."

See, also, 2 Wharton's Criminal Law and Procedure (Anderson ed.), § 478, p. 129.

of the bank's error is indicated by his remark to an acquaintance as he showed him the bank statement. Petitioner's repeated requests for the amount of his balance could only have been intended to make certain that the bank had not discovered its mistake before he presented the check (which he had previously prepared). These circumstances, taken with his subsequent activities in thwarting recovery of the money, establish his intention to convert the bank's funds to his own use.

2. The form of "*Allen* charge" (*Allen* v. *United States,* 164 U.S. 492) given by the trial judge did not go beyond permissible bounds. There is no occasion to reexamine the *Allen* doctrine (see, also, *Lias* v. *United States,* 284 U.S. 584, affirming 51 F. 2d 215, 218 (C.A. 4); *Kawakita* v. *United States,* 343 U.S. 717, affirming 190 F. 2d 506, 521–528 (C.A. 9)), which the Court has declined to review this Term (*Walker* v. *United States,* 342 F. 2d 22 (C.A. 5), certiorari denied, 382 U.S. 859).

Petitioner's contention that the reference to the expense of "all trials" contaminated the instruction is not sound. The judge stated immediately that, while it was "therefore very desirable that a verdict should be reached," he did not "desire that any juror should surrender his conscientious convictions." He made every effort to insure that the jury was not confused on the law, giving supplemental instructions when requested and indicating his willingness to charge additionally if necessary. Cf. *Andrews* v. *United States,* 309 F. 2d 127 (C.A. 5), certiorari denied, 372 U.S.

946. Such a supplemental instruction was given subsequent to the *Allen* charge. In its context, and under the circumstances, the *Allen* charge was not coercive.[4]

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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MARCH 1966.

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[4] Petitioner questions whether the trial court in its supplemental charge to the jury was required to charge additionally on the presumption of innocence and the burden of proof. The trial court previously instructed on those matters (Tr. 137–138), and it was not required to repeat the entire charge.

Petitioner also maintains that he was prosecuted by the State of Alabama for false pretenses. However, he was discharged from State custody prior to trial upon a writ of habeas corpus because (1) an accusatory affidavit was invalid and (2) the evidence taken at a preliminary hearing before a magistrate was held insufficient to support a charge of false pretenses. *Ex parte Thaggard,* 42 Ala. App. 229, 159 So. 2d 813, certiorari denied, 276 Ala. 117, 159 So. 2d 820. Thus, the government's policy against federal prosecution when an individual has been subjected to State prosecution for the same acts (which results in conviction or acquittal) does not apply to the present case.

U.S. GOVERNMENT PRINTING OFFICE:1966